

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIZABETH ESTEY, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH & CO., INC., E.
STANLEY O'NEAL, CAROL T. CHRIST,
ARMANDO M. CODINA, VIRGIS W.
COLBERT, JILL K. CONWAY, ALBERTO
CRIBIORE, JOHN D. FINNEGAN, JUDITH
MAYHEW JONAS, DAVID K.
NEWBIGGING, AULANA L. PETERS,
JOSEPH W. PRUEHER, ANN N. REESE,
CHARLES O. ROSSOTTI, LOUIS DIMARIA,
PETER STINGI and JOHN AND JANE DOES
1-20,

Defendants.

Case No. 07-CV-10268 (DC)

[additional captions follow]

**THE ESPOSITO PLAINTIFFS' NOTICE OF MOTION TO CONSOLIDATE ERISA
CASES, APPOINT INTERIM LEAD PLAINTIFFS AND INTERIM CO-LEAD
COUNSEL, FOR ENTRY OF PRETRIAL ORDER NO. 1, AND IN OPPOSITION TO
PLAINTIFF GIDARO'S MOTION FOR CONSOLIDATION AND APPOINTMENT OF
INTERIM COUNSEL FOR THE CLASS**

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& TOLL, P.L.L.C.**

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Counsel for Plaintiffs Carl Esposito, Barbara Boland, and Anna Molin

MARY GIDARO, individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH & CO., INC., E.
STANLEY O'NEAL, CAROL T. CHRIST,
ARMANDO M. CODINA, VIRGIS W.
COLBERT, JILL K. CONWAY, ALBERTO
CRIBIORE, JOHN D. FINNEGAN, JUDITH
MAYHEW JONAS, DAVID K.
NEWBIGGING, AULANA L. PETERS,
JOSEPH W. PRUEHER, ANN N. REESE,
CHARLES O. ROSSOTTI, LOUIS DIMARIA,
PETER STINGI and JOHN AND JANE DOES
1-20,

Defendants.

Case No. 07-CV-10273 (LBS)

TARA MOORE, individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH & CO., INC., E.
STANLEY O'NEAL, CAROL T. CHRIST,
ARMANDO M. CODINA, VIRGIS W.
COLBERT, JILL K. CONWAY, ALBERTO
CRIBIORE, JOHN D. FINNEGAN, JUDITH
MAYHEW JONAS, DAVID K.
NEWBIGGING, AULANA L. PETERS,
JOSEPH W. PRUEHER, ANN N. REESE,
CHARLES O. ROSSOTTI, LOUIS DIMARIA,
PETER STINGI and JOHN AND JANE DOES
1-20,

Defendants.

Case No. 07-CV-10398 (DC)

GREGORY YASHGUR, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH & CO., INC., E.
STANLEY O'NEAL, CAROL T. CHRIST,
ARMANDO M. CODINA, VIRGIS W.
COLBERT, JILL K. CONWAY, ALBERTO
CRIBIORE, JOHN D. FINNEGAN, JUDITH
MAYHEW JONAS, DAVID K.
NEWBIGGING, AULANA L. PETERS,
JOSEPH W. PRUEHER, ANN N. REESE,
CHARLES O. ROSSOTTI, LOUIS DIMARIA,
PETER STINGI and JOHN AND JANE DOES
1-20,

Defendants.

Case No. 07-CV-10569 (UA)

CHRISTINE DONLON, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH & CO., INC., E.
STANLEY O'NEAL, CAROL T. CHRIST,
ARMANDO M. CODINA, VIRGIS W.
COLBERT, JILL K. CONWAY, ALBERTO
CRIBIORE, JOHN D. FINNEGAN, JUDITH
MAYHEW JONAS, DAVID K.
NEWBIGGING, AULANA L. PETERS,
JOSEPH W. PRUEHER, ANN N. REESE,
CHARLES O. ROSSOTTI, LOUIS DIMARIA,
PETER STINGI and JOHN AND JANE DOES
1-20,

Defendants.

Case No. 07-CV-10661 (UA)

CARL ESPOSITO, individually and on behalf
of all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH & CO., INC., E.
STANLEY O'NEAL, CAROL T. CHRIST,
ARMANDO M. CODINA, VIRGIS W.
COLBERT, JILL K. CONWAY, ALBERTO
CRIBIORE, JOHN D. FINNEGAN, JUDITH
MAYHEW JONAS, DAVID K.
NEWBIGGING, AULANA L. PETERS,
JOSEPH W. PRUEHER, ANN N. REESE,
CHARLES O. ROSSOTTI, LOUIS DIMARIA,
PETER STINGI and JOHN AND JANE DOES
1-20,

Defendants.

Case No. 07-CV-10687 (JGK)

SEAN SHAUGHNESSEY, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH & CO., INC., E.
STANLEY O'NEAL, CAROL T. CHRIST,
ARMANDO M. CODINA, VIRGIS W.
COLBERT, JILL K. CONWAY, ALBERTO
CRIBIORE, JOHN D. FINNEGAN, JUDITH
MAYHEW JONAS, DAVID K.
NEWBIGGING, AULANA L. PETERS,
JOSEPH W. PRUEHER, ANN N. REESE,
CHARLES O. ROSSOTTI, LOUIS DIMARIA,
PETER STINGI and JOHN AND JANE DOES
1-20,

Defendants.

Case No. 07-CV-10710 (UA)

BARBARA BOLAND, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

MERRILL LYNCH & CO., INC., E.
STANLEY O'NEAL, CAROL T. CHRIST,
ARMANDO M. CODINA, VIRGIS W.
COLBERT, JILL K. CONWAY, ALBERTO
CRIBIORE, JOHN D. FINNEGAN, JUDITH
MAYHEW JONAS, DAVID K.
NEWBIGGING, AULANA L. PETERS,
JOSEPH W. PRUEHER, ANN N. REESE,
CHARLES O. ROSSOTTI, LOUIS DIMARIA,
PETER STINGI and JOHN AND JANE DOES
1-20,

Defendants.

Case No. 07-CV-11054 (MGC)

Plaintiffs Carl Esposito, Barbara Boland, and Anna Molin (“Esposito Plaintiffs”) respectfully move this Court to enter [Proposed] Pretrial Order No. 1: (1) consolidating the above-captioned actions; (2) appointing the Carl Esposito, Barbara Boland and Anna Molin as Interim Lead Plaintiffs; and (3) appointing Keller Rohrback L.L.P. (“Keller Rohrback”) and Cohen, Milstein, Hausfeld, and Toll, P.L.L.C. (“Cohen Milstein”) as Co-Lead Counsel, with Cohen Milstein’s New York office serving as liaison counsel. In support of this Motion, Plaintiffs aver as follows:

Plaintiffs in the above-referenced actions filed Complaints for violations of the Employee Retirement Income Security Act (“ERISA”) against Merrill Lynch & Co., Inc. (“Merrill Lynch” or the “Company”) and certain other fiduciaries of the Merrill Lynch 401(k) Savings and Investment Plan (the “SIP”), the Merrill Lynch Retirement Accumulation Plan (the “RAP”), and

the Merrill Lynch Employee Stock Ownership Plan (the “Traditional ESOP”) (collectively the “Plans”), retirement plans established and sponsored by Merrill Lynch & Co., Inc. (“Merrill Lynch” or the “Company”) as benefits for its employees. To date, at least eight actions have been filed in this Court alleging substantially similar ERISA breach of fiduciary duty claims (“ERISA Actions”). The Complaints, filed on behalf of the Plaintiffs and a class of all person who were participants in or beneficiaries of the Plans, seek to recover the losses to the Plans from Defendants’ breaches of their ERISA-mandated fiduciary duties.

Specifically, Plaintiffs’ claims arise from the failure of Defendants, who are fiduciaries of the Plans, to act solely in the interest of the Plans’ participants and beneficiaries and to exercise the required care, skill, prudence, loyalty and diligence in administering the Plans and investment the Plans’ assets. Plaintiffs allege that the Defendants-fiduciaries, as identified and set forth in the Complaints, violated their fiduciary obligations to the Plans under ERISA §§ 404 and 405 of ERISA, 29 U.S.C. §§1104 and 1105, by, among other things:

- (a) Failing to prudently manage the assets of the Plans by continuing to acquire and maintain shares of Merrill Lynch stock for the Plans under circumstances in which Defendants could not have believed that continued acquisition, contributions and investment in Merrill Lynch stock was in keeping with how a prudent fiduciary would operate;
 - (b) Failing to properly monitor the Plans and their fiduciaries;
 - (c) Failing to provide participants with complete and accurate information regarding Merrill Lynch stock, such that they could make informed decisions regarding shares of the stock allocated to them under the Plans;
- and

(d) For co-fiduciary liability under ERISA § 405(a), 29 U.S.C. § 1105(a).

Plaintiffs seek relief pursuant to ERISA §§ 409 and 502(a)(2)-(3), 29 U.S.C. §§ 1109 and 1132(a)(2)-(3). Defendants are responsible for restoring losses sustained by the Plans as a result of Defendants' breaches of their fiduciary duties.

By this Motion, the *Esposito* Plaintiffs respectfully move this Court for an Order formally setting forth procedures for the efficient management of the ERISA Actions, including the appointment of Interim Lead Plaintiffs and a leadership structure for Plaintiffs' counsel. Because the above-captioned ERISA Actions contain similar allegations and seek the same relief, in accordance with the *Manual for Complex Litigation* (4th 2004) (the "*Manual*"), in addition to consolidation, it is appropriate for the Court to enter an order setting forth procedures for the management of these cases and appointing a leadership structure for Plaintiffs' counsel.

In accordance with the recommendations of the *Manual*, Plaintiffs submit for the Court's consideration a [Proposed] Pretrial Order: Consolidating Actions and Appointing Interim Lead Plaintiffs and Leadership Structure, which (i) consolidates the related ERISA actions, (ii) provides for the appointment of Interim Lead Plaintiffs and their counsel, (iii) describes the duties and obligations attributable to counsel thereunder, and (iv) directs counsel to confer regarding a preliminary schedule for these proceedings. Plaintiffs' Co-Lead Counsel will coordinate and organize Plaintiffs in the conduct of this litigation, and will ensure that the interests of all Plaintiffs are represented in the prosecution of this action on behalf of the Class. Pursuant to Fed. R. Civ. P. 23(g)(2)(A), Keller Rohrbach and Cohen Milstein seek appointment as Interim Co-Lead Counsel to act on behalf of the putative class before determining whether to certify the action as a class action.

This Motion is based on the accompanying Memorandum of Law and all papers and pleadings on file in this and the related cases filed with this Court.

Dated: December 14, 2007

Respectfully submitted,

**COHEN, MILSTEIN, HAUSFELD
& TOLL, P.L.L.C.**

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*Counsel for the Esposito Plaintiffs and
Proposed Interim Co-Lead Counsel for the
Class*

CERTIFICATION

This is to certify that the foregoing documents were served on this the ____ day of December, 2007, via electronic mail to all persons on the attached service list:

- 1) *Esposito* Plaintiffs' Notice of Motion to Consolidate ERISA Cases, Appoint Interim Lead Plaintiffs and Interim Co-Lead Counsel, for Entry of Pretrial Order No. 1, and in Opposition to Plaintiff Gidaro's Motion for Consolidation and Appointment of Interim Counsel for the Class;
 - 2) Memorandum in Support of the *Esposito* Plaintiffs' Motion to Consolidate ERISA Cases, Appoint Interim Lead Plaintiffs and Interim Co-Lead Counsel, for Entry of Pretrial Order No. 1, and in Opposition to Plaintiff Gidaro's Motion for Consolidation and Appointment of Interim Counsel for the Class;
 - 3) The *Esposito* Plaintiffs' [Proposed] Order Consolidating ERISA Cases, Appointing Interim Lead Plaintiffs and Interim Co-Lead Counsel; and
 - 4) Declaration (with attached exhibits) of Derek W. Loeser in Support of the *Esposito* Plaintiffs' Motion to Consolidate ERISA Cases, Appoint Interim Lead Plaintiffs and Interim Co-Lead Counsel, Entry of Pretrial Order No. 1, and Opposition to Plaintiff Gidaro's Motion for Consolidation and Appointment of Interim Counsel for the Class
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